

THE CASE REVIEW: 2008 DIGEST

Introduction

The *Case Review 2007* presented a paragraph-by-paragraph analysis of the revised Code of Conduct. This short digest provides you with any new information or cases that we think may be helpful or interesting for you when using that publication. We are not updating and reprinting the whole document due to the limited extent of the changes, but hope that this digest will act as a useful accompaniment.

The updates in this document relate only to certain paragraphs of the Code, where we think further information will be helpful. We have included new and relevant case examples where appropriate. We have also highlighted any new issues that have arisen over the past year.

In addition, there is a section at the end of this document called **Examples on procedural matters**. This consists of case examples that do not necessarily fit under particular paragraphs of the Code, but which you may find useful.

To get the most from this publication, please read it in conjunction with the *Case Review 2007*. If you do not have a copy of the *Case Review 2007*, you can download it for free from our website, www.standardsboard.gov.uk.

If you would like to order a hard copy at a cost of £20, please email publications@standardsboard.gov.uk or call **0161 817 5300**.

Key changes

Since the *Case Review 2007* was published, changes brought about by the Local Government and Public Involvement in Health Act 2007 have seen complaints being dealt with by local authorities. The Standards Board has had a major shift in its focus as a result of this change. We are now a strategic regulator, providing national oversight of the locally owned system.

The key changes to local complaints assessments, which were brought into effect by new and revised regulations, apply only to standards committees of authorities in England. There is no change to the arrangements in complaints assessment for police authorities in Wales and these continue to be dealt with by the Public Services Ombudsman for Wales. We are currently working with our Welsh partners to produce a relevant version of our *Local Standards Framework guidance*, in Welsh.

The government is still reconsidering the way in which the Code does, and does not, impact on someone when they are not acting in their capacity as a member. The changes brought in by the 2007 Act, coupled with the revised Code of 2007, aim to bring certain types of criminal conduct within the scope of the legislation. This is criminal conduct which has resulted in a conviction, even where the activity has not been carried out in an official capacity. At the time of writing, these provisions are not yet in force although consultation on the matter has now started.

paragraph 1

Rulings over members.

The government has now made it a legal requirement that all standards committees must be chaired by an independent member. Also sub-committees of standard committees must be chaired by an independent member when assessing and reviewing complaints, considering reports or when they are actually hearing a complaint.

Furthermore, regulation 5 of the Standards Committee (England) Regulations 2008 no.1085, allows authorities to adopt procedures which govern the temporary appointments of “shared” independent members. They can be appointed to deal with particular allegations or members, and can be appointed for specified periods of time.

In addition, the Local Government Act 1972 has recently been amended by the addition of a new Section 16A. This grants parish councils the power to “appoint persons to be councillors of the council”. Regulations under this section are still awaited.

Whether “meeting” also includes informal meetings.

This is a frequently asked question about paragraph 1 of the Code of Conduct. The answer is no. Informal meetings between members and officers and political group meetings are not covered by the requirement to declare interests (see Q4 on page 8 of the Case

Review 2007 for more information on this).

In the case of APE 0355, the Adjudication Panel for England, in a preliminary issue, had to decide if meetings of the “Development Plans Policy Project Group” were meetings for the purposes of the Code.

The Tribunal reasoned that it was perfectly proper for an authority to set up either a working party or a committee or sub-committee to advise the authority on any matter it saw fit.

Generally, the authority’s subjective intention would determine this issue:

“Where the manifest intention of the local authority was to create a working party that should be decisive unless there was something unlawful behind the intention.” - R, v Warwickshire District Council exp Bailey [1991] COD 284

However, paragraph 6(a) of the Code, which prevents members from using their position improperly, applies at all times when members are acting in their official capacity.

A member should not use pre-meetings or informal meetings to influence a matter in which they have a prejudicial interest. If they do so, they are very likely to fail to comply with the Code by improperly seeking to influence a decision.

paragraph2

Applying the Code of Conduct to members working in a private capacity or representing authorities.

In Q9 under paragraph 2 of the *Case Review 2007*, we answered the question “**When does the Code of Conduct apply?**”.

We would like to add that the issue of whether a member has been representing an authority or acting in a private capacity is something which must be established. This is because it decides whether the Code applies to a member at all.

Ideally this will be established when assessing complaints. However, sometimes it will only become clear during an investigation.

When the Code ceases to apply to suspended members.

The Standards Board is currently considering its position on the consequences of suspension.

If you have any queries about this, please get in touch with us.

Application of the Code when a member is carrying out an activity which is not official business.

A recent case (APE 0389) illustrated the application of the Code when a member is carrying out an activity, which is not in their official capacity.

In this case, the Adjudication Panel for England had to consider the test previously set out by Mr Justice Collins in the High Court case concerning the former Mayor of London, Ken Livingstone.

The Adjudication Panel decided that the councillor was subject to the Code when he used a council computer to access indecent images of children. This case was considered in the context of paragraphs 4 and 5 of the Code.

Here are some further case examples that relate to paragraph 2 of the Code.

Example 1

In APE 0401, the member appealed against a standards committee finding under the 2001 Code. The standards committee had found that the member had failed to treat others with respect and brought his office or authority into disrepute. This was by using his position to gain entry to a council-funded organisation and then:

- demanding information from staff
- becoming aggressive
- threatening staff's employment
- refusing to leave until senior staff threatened to call the police

The Adjudication Panel for England decided that the standards committee had failed to address whether the member's conduct was undertaken

paragraph2

Continued ...

in an official capacity. In the Tribunal's view, the judgment in the Livingstone case established that for a member to be acting in their official capacity:

- 1) they should be engaged in business directly related to the Council or constituents
- 2) the link between office and the conduct should have a degree of formality

The Tribunal found that the member was not on council business and there was no apparent relationship between the purpose of his visit and any relevant function of the council. The mere fact that he declared himself a councillor while undertaking his visit could not justify a conclusion that he was acting in his official capacity. Accordingly, the Tribunal decided that the member did not fail to treat others with respect in his capacity as a councillor.

However, by so clearly identifying himself as a councillor, his conduct had come within paragraph 4 of the Code. This says that "a member must not in his official capacity or any other circumstances, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute". Even on the restrictive definition of "in any other circumstance" as set out in the Livingstone case, his behaviour was caught by the Code, and therefore the finding of a breach was upheld.

paragraph3

Here are three new case examples that relate to paragraph 3 of the Code of Conduct.

Example 1

In APE 0378, a councillor wrote to an officer, the chief executive, in rude terms demanding action where she had no authority to do so. In this instance, the Adjudication Panel for England decided that the member had not shown disrespect to the chief executive of the authority. The Adjudication Panel decided that sufficient weight had to be given to the fact that the officer was the chief executive, and it was significant that there was no direct personal attack on that officer.

Conversely, the Adjudication Panel did find that there was disrespect shown to a senior police officer. This is because the councillor did not address him respectfully in email correspondence and referred to him by his surname outside of the expected norms of such relationships. This was compounded by the circulation of the offending emails to junior and senior officers within both organisations.

Example 2

In the same case above, APE 0378, the tribunal considered whether racist comments can have a political dimension and examined whether they could be afforded the protection of freedom of expression under Article 10.

The councillor made a complaint about planning enforcement, stating that “those wishing to buck the system were usually of ethnic origin”.

The Tribunal considered the High Court case of Sanders v Kingston on the degree of protection a councillor is entitled to when considering that councillor’s right to freedom of expression. The Adjudication Panel summarised the judge’s reasoning and concluded “that a person is entitled to the extremely high level of protection which the authorities demonstrate must be given to political expression because of its fundamental importance for the maintenance of a democratic society. However, a factual investigation of the nature of the words used is necessary to determine whether they amount to political expression, or whether they are no more than expressions of personal anger and personal abuse”.

The Tribunal decided that where a member based expressions of opinion on prejudice against people it would, in the mind of a reasonable person, bring both the office and authority into disrepute. This is not only due to the authority’s statutory duties under anti-discrimination legislation, but also because such attitudes fall far short of what is expected of those holding public office.

Example 3

The Tribunal in the case of APE 0399 considered the threshold for a failure to treat

paragraph3

Continued ...

others with respect. The subject member made comments about the town clerk at a parish meeting saying that an officer found her “difficult to get on with”. The member added that “this is also the view of many town’s people who say that when they try to contact the town clerk, she is downright rude to them”.

The Tribunal considered that the threshold for a failure to treat another with respect has to be set at a level that allows for the passion and frustration that often accompanies political debate and the discussion of the efficient running of a council. It should also be set within the context of who was involved in the exchange.

In this case, the comments were opinions of other individuals which the member honestly believed to be true. The member’s conduct was not unfair, unreasonable or demeaning to the town clerk and not made in a malicious or bullying manner. The town clerk was very experienced in her dealings with councillors and given her seniority was entirely able to defend her position. So the Tribunal decided that the threshold was not met.

paragraph4

There are no updates to paragraph 4

paragraph5

Here are two new case examples that relate to paragraph 5 of the Code of Conduct.

Example 1

The Adjudication Panel for England considered case APE 0383 under the 2001 Code. In this case, a councillor was given information in a private briefing to councillors. The briefing was about the council's proposals to buy land and relocate its offices to another town.

The information was made public swiftly after this. The councillor did not agree with the proposals, and secretly bought the land to prevent the council considering it as an option for its future operations. The link to his office was clearly made.

Together with the lack of openness, these actions diminished public confidence in his ability to discharge his office as a councillor. He had therefore conducted himself in a manner which would reasonably be regarded as bringing his office or authority into disrepute. He had also failed to register the exchange of contracts in the land within 28 days. However, the Tribunal decided that he had not improperly sought to secure an advantage or disadvantage. This is discussed further in the cases given under paragraph 6 on page 8.

Example 2

The Adjudication Panel for England decided that a member had brought his office or authority into disrepute in the case APE 0387, under the 2001 Code.

In this case, the member had issued threats to another member immediately before a planning decision was taken. The threats concerned the deselection of the councillor and were coupled with offensive language. These threats were overheard.

The Tribunal did not find these threats improper in the context of political life, and accepted that future careers could be affected by the way a member voted.

However, the Tribunal did find that the comments were disreputable. This was especially so when there was a planning protocol which had been adopted by the council, although not incorporated in the council's code of conduct. The threats and actions of the member constituted a failure to follow that guidance and a breach of that protocol, and so were sufficient to be disreputable.

paragraph6

In the Case Review 2007, we asked “What kinds of attempts to secure advantages or disadvantages would be improper?”.

Here are two further case examples which relate to this question.

Example 1

The Adjudication Panel for England considered a case under the old Code of Conduct, APE 0383.

In this case, the council intended to purchase land to relocate its offices from one town to another. The council provided information privately to councillors but swiftly after this, made all the information public.

The subject member privately purchased the land to prevent the council from buying it, because he did not agree with the relocation plans. The councillor also incurred a significant loss in the venture.

The Tribunal decided that because he was acting in the public interest, however misguided, and gained no benefit, he did not use his position improperly to secure an advantage or disadvantage. However, the Tribunal did decide that he had brought his office or authority into disrepute and this is dealt with under paragraph 5 on page 7.

Example 2

In a case decided by the Adjudication Panel concerning a mayor, APE 0382, the Tribunal decided that there was no attempt to improperly secure an advantage or disadvantage.

This was in a situation where the member held a meeting, whose purpose was unclear, with one of two parties who were in dispute with each other and the council. Officers were not present at the meeting.

The mayor had previously been a director of one of the parties and at the meeting personally drew up a document whose purpose was uncertain. The Tribunal concluded that the actions were foolhardy and there was an unexplained pattern of behaviour favouring one party. However foolish the actions were, they did not amount to a breach of the Code.

paragraphs 7-10

There are no updates to paragraphs 7-10

paragraph 11

Whether members who have prejudicial interests can nevertheless remain in the meeting after they have answered questions and given their evidence to the committee.

This is a frequently asked question on paragraph 11 of the Code of Conduct. We are aware that some authorities actively encourage all their members to attend overview and scrutiny meetings to better inform and improve the quality of the authority's decision-making.

Our view is that the decision of the Court of Appeal in Richardson would still apply in these circumstances and that normally, after their statutory role is finished, members with prejudicial interests should withdraw from the room.

paragraph12

Here is an example relating to paragraph 12 of the Code of Conduct.

Example 1

In APE 0395, an appeal from a standards committee, the member declared a personal and prejudicial interest and withdrew from the meeting. He returned after the conclusion of the item to chair the remainder of the agenda.

The standard agenda item enabling members of the public to raise issues they would like to be included on the next meeting's agenda was then considered. At this point, a member of the public expressed dissatisfaction about the minimal progress made in reaching a decision on the item in which the chair had previously declared the interest. A short exchange then followed between some councillors and that member of the public.

The tribunal decided that this exchange did not constitute consideration for the purposes of the Code, as there was no intention to have a further discussion on that item.

paragraphs13-14

There are no updates to paragraphs 13-14

examples on procedural matters

The following are case examples of procedural matters which do not necessarily fall under particular paragraphs of the Code of Conduct.

Example 1

In the case APE 0403, the appeals tribunal was of the view that whether or not advice is provided, it is the personal responsibility of a member to determine if they have a prejudicial interest and so whether they need to withdraw. This means that even if a member relies on incorrect legal advice, it does not mean that a breach has not been committed. Any advice sought or given only affects the seriousness of the breach and therefore the sanction.

Example 2

The appeals tribunal decided in the case APE 0403, that a standards committee does not exceed its jurisdiction by dealing with a matter that has not been complained about. In this case, the investigating officer's report did not reflect the complainant's letter in exact terms. However, the tribunal decided that the facts and matters which gave rise to the breach were clearly before the standards committee. The tribunal therefore decided it was not a matter beyond the standards committee's jurisdiction.

Example 3

The appeals tribunal made clear in the above case, APE 0403, that the role of the investigating officer is to collect together the evidence and then present this to the standards committee. It

was not, in any sense, the investigating officer's evidence.

It was also part of the investigating officer's role to give their views on whether the evidence substantiated a breach of the Code. This stood as advice to the standards committee to take into account, but which it was not obliged to follow.

Example 4

The original complaint does not fix the scope of the investigation – it is simply the initiating act. The appeals tribunal in the case APE 0401 found that it was legitimate for the investigating officer to ultimately allege a breach of the Code not identified by the complainant.

Example 5

The appeals tribunal in the case above, APE 0401, found that it was also legitimate for an investigating officer to "chaperone" a witness. Where a witness is called by the investigating officer to support a finding in their report of an alleged breach of the Code, there was no obligation on the investigating officer at that stage of the process to adopt an impartial stance.

Example 6

The appeals tribunal advised in the case APE 0399 that a situation might arise where the facts of the case are undisputed and the case is being heard in the absence of the subject member. This is on the basis of papers served on them before the hearing.

examples on procedural matters

Continued ...

In such situations, further evidence should not be introduced to the standards committee without giving the subject member the opportunity to look at the substance of that evidence. The subject member is then able to make a decision about whether to attend the hearing to rebut the evidence or to make written representations about it.

Example 7

The appeals tribunal in the case above, APE 0399, also advised that while standards committees are free to regulate their own procedures, following Standards Board guidance provides a firm procedural foundation for the hearings. Not doing so in this case may have led to a degree of unfairness at the hearing.

Example 8

In APE 0394, the appeals tribunal advised that where an allegation is about a failure to declare a personal interest at a meeting, it is essential that the committee satisfies itself that the member was present at the relevant meeting. This is on the basis of the available evidence, usually in the form of committee minutes. The standards committee should not expect the member to prove that he was not present at the meeting.

Example 9

In the case tribunal APE 0378, the Tribunal noted that Parliament had not provided any limitation period within which a complaint had to be made. Therefore, if an allegation relies on a series of events, it is appropriate for the Tribunal

to look at the individual event as part of that series when considering whether its age makes it unfair or detrimental to the subject member.

In considering unfairness and the detrimental effect in this case, the Tribunal took into account:

- that all the events occurred within two years
- the allegations were supported by written evidence rather than personal recollections
- the events related to breaches of the same paragraph of the Code
- the member had not identified any detriment she had suffered as a result of the age of some of the events

There was therefore no unfairness or detriment in the allegations being dealt with.

Example 10

In APE 0396, the chair at a planning meeting declared a personal interest but not a prejudicial interest, which he also had. The member voted at the meeting and used his casting vote as chair following an equality of votes to object to the planning application. The appeals tribunal upheld the standards committee finding that the use of the casting vote elevated the seriousness of the breach. This was taken into account when the sanction was imposed.

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